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Labor & EMPLOYMENT

The DOL's new expansive guideline on joint employment under the FSLA

"Ensuring a fair day's pay for a fair day's work." This is the admirable goal of the United States Department of Labor. David Weil, *Our Plan for Protecting Workers' Paychecks*, U.S. Dep't of Labor Blog (Feb. 11, 2016), https://blog.dol.gov/2016/02/11/our-plan-for-protecting-workers-paychecks/. Weil, the administrator of the DOL's Wage and Hour Division since May 2014, 29 U.S.C. § 204, is the champion of that goal.

The motto has the support of employers and employees alike. Who would disagree with paying someone a fair day's pay for a fair day's work? The problem, however, arises when one company is forced to pay a "fair day's pay" for a second company's employees under a joint employment theory, an obligation that the first company had not bargained for, agreed to, or thought had been properly contracted or outsourced.

Therefore, it is crucial to know when an employer could be "on the hook" for financial obligations to another company's employees.

According to the DOL, "[j]oint employment exists when a person is employed by two or more employers such that the employers are responsible, both individually and jointly, for compliance with a statute." U.S. Dep't of Labor, *Joint Employment Under the FLSA and MSPA*, (visited Apr. 7, 2016), www.dol.gov/whd/flsa/jointemployment.htm.

Joint employment, or joint liability, applies to statutes such as the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), which require that employers pay minimum wages and overtime, and observe recordkeeping and child labor laws.

By AMANDA L. LOWE
Daily Record Columnist

On Jan. 20, 2016, the DOL issued its first written guidance of the year, an Administrator's Interpretation ("AI") focusing on joint employment status under the FLSA and MSPA. U.S. Dep't of Labor, *Opinion Letter Fair Labor Standards Act (FLSA)*, Administrator's Interpretation No. 2016-1, 2016 WL 284582 (Jan. 20, 2016). But why now? And, so what?

Most employers believe they can tell whether they are subject to joint employer status. Employers may need to reconsider and reevaluate their contracting arrangements, however, because the DOL now aims to use joint employment "to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations." *Id*. at *1.

That's right, the DOL is looking for additional (and, most likely, deeper) pockets to fulfill unpaid overtime, back wages, and other FLSA obligations. Moreover, under "joint and several" liability, each employer is financially responsible for each joint employee regardless of a co-employer's ability to pay. So even if you think you aren't a joint employer, if the DOL believes you are, they may look to your company to fulfill obligations a different company hasn't met.

So what's at stake?

It is in every employer's best interest to learn the DOL's standards for joint employment. The DOL boasts that in 2014 it collected more than $246 million in back wages for 240,000 employees. David Weil, *Working for a Fair Day's Pay*, U.S. Dep't of Labor Blog (Dec. 22, 2015), https://blog.dol.gov/2015/12/22/working-for-a-fair-days-pay/. During the last quarter of 2015, the DOL recouped wages and damages from joint employers ranging from $2,400 - $5,500 *per employee*.

See U.S. Dep't of Labor, Emp't Standards Admin., *US Labor Department Obtains Joint Employment Judgment Ordering DirecTV to Pay $395k in Back Wages and Damages to 147 Cable Installers in Washington*, Rel. No. 15-2036-SAN, 2015 WL 9839513 (Oct. 22, 2015); U.S. Dep't

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of Labor, Emp't Standards Admin., *J&J Snack Foods Pay More Than $2.1M In Back Wages, Damages to 677 Temporary Workers in New Jersey, Pennsylvania*, Rel. No. 15-1976-NEW, 2015 WL 6460370 (Oct. 27, 2015); U.S. Dep't of Labor, Emp't Standards Amin., *Florida Dept. of Corrections to Pay 294 Health Care Workers More Than $723k in Back Wages After Failing to Pay Overtime*, Rel. No. 15-2018-ATL, 2015 WL 9839525 (Nov. 17, 2015); U.S. Dep't of Labor, Emp't Standards Admin., *Phoenix-Area Restaurants to Pay More Than $105k in Overtime Back Wage and Damages to 19 Employees Working at Three Locations*, Rel. No. 15-2178-SAN, 2015 WL 9704746 (Dec. 2, 2015).

At a cost of thousands of dollars per employee, it is important to be aware of the metrics the DOL is using to determine who qualifies as a joint employer.

Horizontal joint employment versus vertical joint employment

In the AI, the DOL differentiates between horizontal and vertical joint employment arrangements.

Horizontal joint employment focuses on the relationship between two potential joint employers, including whether they are sufficiently associated or related to be held responsible for the same employee. The DOL provides an example of horizontal joint employment where employees were employed at five different restaurants, but the restaurants had common ownership, had the same manager, and were overseen by a single area director. *See Chao v. Barbeque Ventures, LLC,* No. 8:06CV676, 2007 WL 591772 (D. Neb. Dec. 12, 2007), ***aff'd***, 547 F.3d 938 (8th Cir. 2008).

The DOL considers the following factors relevant in analyzing a potential horizontal joint employment relationship: Ownership status (e.g. one owner or common owners); Overlapping officers, directors, executives or managers; Shared control over operations, including hiring, firing, payroll, advertising and overhead costs; Intermingled operations; Authority to supervise the other employer or another's employee(s); Treatment of employees as a "pool" available to both employers; Shared clients or customers; and agreements between the employers.

Vertical joint employment, on the other hand, focuses on the economic realities of a relationship between the employee and potential joint employer. An example cited by the DOL is where Company A has contracted for workers who are directly employed by Company B, but Company A maintains sufficient control over the workers and the work performed is essential to Company A's business. *See Perez v. Lantern Light Corp.*, No. C12-01406-RSM, 2015 WL 3451268 (W.D. Wash. May 29, 2015).

The DOL considers the following factors relevant to its vertical employment analysis: The degree and ability to direct, control, or supervise an employee's work; The ability to control employment conditions, such as hiring, firing, modifying employment conditions or determining the rate of pay; The duration of the business relationship (between employee and potential joint employer); The extent to which the employee's work is repetitive, rote, unskilled, or requires little or no training; Whether the employee's work is integral to the potential joint employer's business; Whether the employee works on the potential joint employer's premises; and the extent which the potential joint employer performs administrative functions for the employee, such as payroll, providing workers' compensation insurance, providing facilities and safety equipment, housing or transportation, or providing tools and materials required to do the work.

The new era of joint employment

The DOL's new guidance is part of a continuing regulatory effort to expand the traditional definition of joint employment to ensure as many employees are covered as possible. *See, e.g., Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (where the National Labor Relations Board upended decades of precedent and expanded its definition of "joint employer" to include companies that may share some direct or even indirect control over each other's employees).

Although the AI does not have the binding effect of a DOL regulation, the DOL has made it clear that it intends to ramp up efforts to recoup back-owed wages and overtime, including from joint employers. Along with this promise comes a warning — when the DOL does investigate, the DOL finds violations in almost eight percent of its agency-initiated investigations. David Weil, *Working for a Fair Day's Pay*, U.S. Dep't of Labor Blog (Dec. 22, 2015), https://blog.dol.gov/2015/12/22/working-for-a-fair-days-pay/.

The DOL is strategically targeting industries where it claims "labor law violations are greatest—that is, in industries where workers are most likely to be mistakenly or deliberately cheated out of their wages, and where they are least likely to speak up and report such violations."

David Weil, *Strategic Enforcement to Maximize Impact*, U.S. Dep't of Labor Blog (Oct. 31, 2014), https://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact/. Based on historical DOL targets, we can expect increased scrutiny to continue in the construction, staffing, health care, hospitality, franchise, and restaurant industries as well as industries with traditionally low wages.

As always, employers should continue to be mindful of their obligations under the FLSA and MSPA. Employers should review their current and future employment and staffing arrangements (including outside vendors and contractors) with their legal counsel.

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